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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 597

ALFRED V. GOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum order of the District Court denying petitioner's motion to withdraw his plea of guilty (R. 18-29) is reported at 10 Federal Rules Decisions 332. The *per curiam* opinion of the Court of Appeals (R. 204-205) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1951. (R. 206.) The petition for a writ of certiorari was filed on March 9, 1951.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether petitioner has an absolute right under Rule 32(d) of Federal Rules of Criminal Procedure to withdraw his plea of guilty at any time before imposition of sentence.

RULE INVOLVED

Federal Rules of Criminal Procedure:

Rule 32. SENTENCE AND JUDGMENT.

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner waived indictment and pleaded guilty (R. 40) to a three count information, charging him under Section 145(b) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 145) with wilfully attempting to defeat and evade a large part of the taxes owing by him to the United States for the years 1943, 1944 and 1945 (R. 2-4). For several days prior to the entry of the plea of guilty, the petitioner and his attorney had a copy of the in-

formation which petitioner had taken home and studied. (R. 144). At the time of the entry of the plea, the Government made a statement of facts (R. 41), after which the court gave petitioner an opportunity to be heard. Petitioner's attorney, Hewitt, stated that he had no explanation or excuses to make with respect to the charges, but requested leniency. (R. 47.) Petitioner remained silent. The court stated that he usually sent tax evaders to prison; that if counsel had anything to say why he should not send petitioner to prison he should address himself to that subject because "I will tell you frankly I am disposed to send him to prison." (R. 47.) The court deferred sentence at that time to give petitioner an opportunity to settle his civil tax liability. (R. 50-51.)

Within a few days, the petitioner, without his attorney, asked to see the judge in chambers. His request was refused. Later a friend of petitioner tried to intercede on his behalf. The judge refused to listen. (R. 186.) Petitioner then discharged his first attorney, Hewitt, and Mr. Garner Anthony entered an appearance for petitioner. (R. 7-8.) On February 20, 1950, Mr. Anthony appeared in court with petitioner and on oral motions requested (1) that petitioner be allowed to withdraw his pleas of guilty to the three count information, and (2) that the new attorney, since he came into the case only recently, be given time to check into the matter of petitioner's civil liability. (R. 55.) The court

denied the motion to withdraw the pleas of guilty (R. 60), but did grant additional time to determine petitioner's civil liability (R. 59). The court again admonished petitioner that in this type of case he usually sent tax evaders to prison. (R. 57.) Before the new date for sentence, petitioner's attorney again requested additional time to determine petitioner's civil liability. The United States Attorney consented and more time was granted. (R. 16.) Near the expiration of the third period of time to consider payment of the civil liability, petitioner's attorney represented that a carry-back loss of $23,000 might result in no tax liability for 1946 and possibly 1945 and 1944. (R. 189, 190.)

On May 16, 1950 (R. 61), the court again considered petitioner's motion to withdraw his pleas of guilty. Because the court found the affidavits submitted by petitioner to be conclusory only (R. 23), petitioner decided to, and did, introduce testimony in support of his motion (R. 78-79). Petitioner testified that he pleaded guilty to the information on the advice of his first attorney, Mr. Hewitt. (R. 87.) The Government then called Mr. Hewitt to testify. He stated he had practiced law for thirty years and attended an administrative hearing with tax officials at which the petitioner and his bookkeeper were present. (R. 103, 141.) After the hearing, Mr. Hewitt asked the petitioner: "How are you going to explain all of that?" Thereupon the petitioner threw up his

hands and said: "It is no use. I might as well give up." Mr. Hewitt stated he then asked petitioner: "Do you mean plead guilty?" And the petitioner said "Yes." (R. 143-144.)

Mr. Hewitt also testified that after petitioner studied the information and discussed it with his bookkeeper, he returned it the next morning. He then asked petitioner if he had any complaint with it at all, or if there was any defense he had to it. Petitioner replied: "No." (R. 144.)

Following this testimony, the court denied the motion to withdraw the pleas of guilty, stating "I do not find the evidence establishes a basis for the Court to exercise its discretion in favor of granting the motion. I do not find that the allegations of the defendant's affidavit accompanying his motion are supported by the evidence. It is therefore lacking a foundation upon which the Court can exercise its discretion in favor of the motion; consequently, the motion is denied." (R. 193).[1]

On June 1, 1950, upon petitioner's pleas of guilty, the court adjudged him guilty as charged in the information and sentenced him to imprisonment for two years and to pay a fine of $1,000 as to count one; two years' imprisonment and a fine of $1,000 as to count two; two years and a fine of $1,000 as to count three, the sentences of imprisonment under counts two and three to run concurrently. (R. 30.)

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[1] See also the opinion of the District Court (R. 18-29).

On appeal, the judgment of conviction was affirmed by the Court of Appeals for the Ninth Circuit. (R. 206.)

ARGUMENT

Petitioner claims that under Rule 32(d), Federal Rules of Criminal Procedure, he has an absolute right to withdraw his plea of guilty before sentence. This claim is predicated upon the contention that the withdrawal of a plea of guilty before sentence must be viewed upon a different basis than a plea after sentence. Petitioner concedes (Pet. 4-5) that prior to, and under, Rule II(4) of the Rules of Practice and Procedure in Criminal Cases for the District Courts (former rules, 292 U.S. 661, 662), a motion to withdraw a plea of guilty before sentence was within the court's discretion. *United States* v. *Denniston*, 89 F. 2d 696 (C.A. 2), certiorari denied, 301 U.S. 709; *United States* v. *Colonna*, 142 F. 2d 210 (C.A. 3). But he contends that the new Rule was designed to make the granting of such a motion obligatory.

Neither the language nor the history of the Rule suggests that any such drastic change was intended. Rule II(4) of the former Rules provided that (292 U.S. 662):

> A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

The first clause of the present Rule states that:

> A motion to withdraw a plea of guilty or of

> *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended.

The note of the Advisory Committee on Rule 32(d) states only that:

> This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See Rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661.

The Advisory Committee's reference to the deletion of the ten-day limitation shows that this was regarded as the major change contemplated.[2] The change in wording from "a motion to withdraw a plea of guilty *shall be made* * * * before sentence is imposed" to "a motion to withdraw a plea of guilty * * * *may be made only* before sentence is imposed" does not indicate in the slightest that the discretion vested in the court acting on the motion was to be reduced. If the Rule had been meant to overturn the practice established for years, both under and antedating the prior Rule, it would have said so with a great deal more clarity; at the very least, the history of the Rule would have indicated that it was intended to have such an effect.

Petitioner argues that the second clause of Rule 32(d), authorizing the setting aside of a judgment *after sentence* "to correct manifest injustice,"

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[2] The new references to pleas of *nolo contendere* and suspended sentences do not affect the present problem.

which has, of course, been construed as allowing the trial courts to exercise discretion, shows that the first clause cannot be construed as giving room for discretion. But the two clauses call for the exercise of discretion on different planes. As Judge Holtzoff, Secretary of the Advisory Committee on the Federal Rules of Criminal Procedure, stated in a discussion of the meaning of the new rules:[3]

> Under the present rules there is a time limitation on motions to withdraw a plea of guilty. We have substituted the rule that at any time prior to sentence, the court at its discretion may grant such permission, and even after sentence, in extreme cases, it may do so.

Thus, after sentence, the burden of the defendant is much heavier; he must show "manifest injustice." Prior to sentence, the district court may permit withdrawal of the plea for less weighty reasons, just as it could before. But the second clause can hardly be read as depriving the courts of all discretion in proceedings under the first clause, and thereby making mandatory granting of a motion to withdraw a plea before sentence in all circumstances.

Petitioner moved to withdraw his plea of guilty

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[3] Federal Rules of Criminal Procedure—With Notes and Institute Proceedings, Proceedings of the Institute of Federal Rules of Criminal Procedure, New York University School of Law (1946), p. 227.

only after the court stated that it usually sent tax evaders to jail and was disposed to imprison petitioner. To permit a defendant to wait until he could gauge the severity of the sentence he was to receive would enable him to trifle with the court if defendant had an absolute right to withdraw his plea of guilty when he thought his sentence would be severe. The courts have held that a defendant may not withdraw a plea because a sentence is more severe than expected. *United States* v. *Colonna*, 142 F. 2d 210 (C.A. 3); *Stidham* v. *United States*, 170 F. 2d 294, 298 (C.A. 8); *United States* v. *Sehon Chinn*, 74 F. Supp. 189, 191 (S.D. W. Va.), affirmed, 163 F. 2d 876 (C.A. 4).

Petitioner has never claimed he was not guilty of the charges to which he pleaded guilty. He admitted there were errors in his tax returns, challenging only the amount charged in this indictment. (R. 196.)

CONCLUSION

The decision below is in all respects correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1951.

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